request for a temporary restraining order was held on March 7 and 8, 1963, at which affidavits and testimony were presented. At the conclusion of the hearing, Petitioners agreed to discontinue the boycott pending final adjudication of the case and no order was entered.

Subsequently the Respondents filed a similar action against the International Union based upon the same allegations and requesting similar relief. The two actions were consolidated for trial and hearings held on May 15, 16 and 20, 1963.

The evidence presented is fairly stated in the District Court and Circuit Court opinions and need not be reviewed here. Appendix A. pp. 3a etc.; 34a-37a.

The District Court concluded that the activities of the Union and its members, violated the Federal anti-trust laws as *per se* unreasonable restraint of trade, Appendix A, p. 29a, but dismissed the complaints on the grounds that Petitioners' conduct was exempt from the antitrust prohibitions under Sections 6 and 20 of the Clayton Act and under the Norris-LaGuardia Act, since the horseshoers were employees of the trainers.

Respondents appealed to the United States Court of Appeals for the Fourth Circuit and an initial hearing was held on April 24, 1964 before a three judge panel. On February 3, 1965, the Court of Appeals for the Fourth Circuit set the case for argument *en banc* at the April, 1965 session and argument was held on April 5, 1965 before the Court *en banc*.

On November 5, 1965, the Court reversed the order of the District Court and the cause was remanded in a 3-2 decision.

The three man majority of the Court held that, under common law standards, the horseshoers are independent contractors and hence their actions are not exempt from the Federal antitrust laws. Appendix A, pp. 13a.

The majority of the Court further held that there was no labor dispute present so as to invoke the Norris-LaGuardia Act since the dispute in no way involved any persons who were employees. Appendix A, pp. 22a.

Judges Sobeloff and Bell dissented on the grounds that there was ample evidence that supporting the District Court's decision that the horseshoers were employees and that in any event the dispute involved wages and working conditions of persons who sold only their labor, hence was covered by the Norris-LaGuardia Act. Appendix A, p. 23a.

REASONS FOR GRANTING THE WRIT

1. Clearly the questions presented are important in the administration of the Federal antitrust laws with respect to its applications to labor or organizations comprised of "atypical" employees, seemingly entrepreneurial in form. The decision of the Fourth Circuit has grave consequences for these groups who have traditionally formed and joined unions for their protection.

The accommodation of apparently conflicting Federal policies in the area of restraint of trade and labor-management relations in the Sherman, Clayton and Norris-LaGuardia Act has raised difficult questions as to the application of antitrust laws to working people and their union activities. Since this Court has stated that an employer-employee relationship must be the "matrix" of a controversy in order to have a labor dispute which is exempted from the application of the antitrust laws, *Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942),

the problem of the tests and standards to be employed in determining this relationship are of utmost importance. The Court did, in fact, establish these standards under the National Labor Relations Act in *N. L. R. B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). There are, however, no such standards in any of the Court's decisions since this Court decided in *United States v. Hutcheson*, 312 U.S. 219 (1942) that the provisions of the Sherman, Clayton and Norris-LaGuardia Acts must be considered together in determining the scope of the exemption of union activities from the antitrust provisions.

It is submitted that the instant case is an appropriate vehicle for deciding whether common law tests are adequate for the determination of the scope of the exemption. The issue here is clearcut. Five days of hearings developed fully the facts of the relationship between the farrier and the horsemen. There are no activities such as that which appeared in *Allen Bradley Co. v. Local 3*, 325 U.S. 797 (1945) or in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) which would take such conduct out of the scope of the exemption. Nor are there any products whose price was fixed such as fish, as in *Columbia River Packers Association, Inc. v. Hinton*, supra or as grease in *Los Angeles Meat and Provision Drivers v. U. S.*, 371 U.S. 94 (1962). Nor are the horseshoers so clearly "independent contractors" and not "employees" as doctors and real estate brokers, *American Medical Association v. United States*, 317 U.S. 519 (1943); *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950).

Simply stated, the Court below decided that if there is not present a common law employer-employee relationship between those who desire to establish a minimum wage and other union conditions and those who are requested

to meet these standards there is a *per se* violation of the Federal antitrust laws in the effort to enforce such standards. It is submitted that neither the Federal antitrust laws nor the Norris-LaGuardia Act requires such a narrow approach.

The decision that common law standards should be used to determine such important concerns of Federal labor policy is in conflict with this Court's decision in *N. L. R. B. v. Hearst Publications, Inc.*, supra when it rejected the common law standards employed by the Circuit Court of Appeals for the Ninth Circuit, 136 F. 2d 608, to determine whether the newsboys were or were not employees within the meaning of the National Labor Relations Act. Instead the Court considered "the ends sought to be accomplished by the legislation" and concluded that with respect to such ends, "the economic facts of the relation" may "make it more nearly one of employment than of independent business enterprise." Id. p. 128. The standards used by the Court in that case applies precisely to this case at bar:

> "Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical legal relation of 'master and servant' as the common law had worked this out and in all its variations, and, at the same time, a narrower one than the entire area of rending service to others. The question comes down, therefore, to how much was included of the intermediate region between what is clearly and unequivocally 'employment' by any appropriate test, and what is as

clearly entrepreneurial enterprise and not employment" (Id. p. 124).

This Court then rejected "the traditional common-law conceptions" as inconsistent with the National Labor Relations Act's broad terms and purposes.

The imposition of these "traditional common-law conceptions" upon Section 20 of the Clayton Act and the Norris-LaGuardia Act is equally inconsistent with the broad terms and purposes of these acts.

Since the passage of the Norris-LaGuardia Act and this Court's decision in *United States v. Hutcheson,* supra, it is clear that protection from the antitrust laws has been afforded the activities of combinations of working people formed for the purpose of increasing the laborer's reward.

The opinion of the Court in the *Hutcheson* case, supra, traces in some detail the familiar history of the efforts to secure legislative relief from the restrictions imposed pursuant to the Sherman Act by means of the Clayton Act of 1914 and the Norris-LaGuardia Act of March 23, 1932. The Court clearly and understandably stated that "such legislation must not be read in a spirit of mutilating narrowness" and that it should not be read as "a tightly drawn amendment to a technically phrased tax provision." Id. 235. In short, this Court has made it very clear that the broad Congressional policy was to preserve the rights of labor to organize to better its conditions through unions and collective bargaining.

The relationship between the horseshoer and the trainer is the result of an historical development stemming from the motor vehicle.

In the twentieth century, the economic basis of horseshoeing changed with the vanishing of the transportation

horse and the rise of the automobile. Where earlier the farrier was employed by a shop to which owners brought their horses, today the farrier must go where the horses are located. The methods used today are the results of this economic fact. The farrier has switched from working for one shop owner, to two or three horse owners, to the public horse trainer. Today there are no shops and only 15 or 20 stables are large enough to pay salaries to horseshoers. The trainer who is in charge of the horses of many different owners, will employ the horseshoer to work under him. The method of payment has changed from a salary paid by the shop owner or the horse owner to piecework so that the trainer could allocate and pass on the cost of horseshoeing to the owner of the specific horse being shod. Thus, it is the economical and historical development that dictates the methods by which the horseshoer works.

The Court of Appeals for the Fourth Circuit rejected this economic and historical approach for the narrow common law approach and by so doing not only might have ended the Horseshoers Union, an organization in existence since 1874, but threw considerable doubt upon whether other "atypical employees" such as musicians, actors, insurance agents, artists, architects and engineers might continue to form and join unions to obtain decent compensation, decent hours and decent working conditions where the practice of self organization and the use of collective bargaining to resolve labor disputes has been common.

That guide lines for determining an employer-employee relationship are needed is foreshadowed in *Los Angeles Meat and Provisions Drivers v. U. S.*, supra, see concurring opinion p. 105 and in the dissent of Judge Sobeloff, Appendix A, p. 25a. Such need is further dramatized by the extreme difficulty the Courts below had in deciding this case. The District Court judge found an employment re-

lationship. The three man Circuit Court panel apparently could not agree. The Court *en banc* was split 3-2. All of the Judges relied upon past decisions of this Court.

2. The decision and opinion of The United States Court of Appeals for the Fourth Circuit in the instant case not only is not in accordance with this Court's decision in *N. L. R. B. v. Hearst Publications,* supra, but is in conflict with the decision and opinion of the Court of Appeals for the Eighth Circuit in *Mitchell v. Gibbons,* 172 F. 2d 970 (1949).

In *Mitchell v. Gibbons,* the Court rejected the argument that the provisions of the Taft-Hartley Act of 1947, 29 U.S.C.A. Section 152(3) affected the application of the *Hearst* case principles to the Norris-LaGuardia Act in determining whether there was a labor dispute and hence exempt from the Federal anti-trust laws. The Court stated, page 973:

> "But the amendments relied on do not justify refusal to apply the law to the facts pleaded here in accordance with the Supreme Court decisions in the Hearst case."

In the instant case, the majority of the Court below rejected the *Hearst* case approach employed by the Eighth Circuit in *Mitchell v. Gibbons* and stated:

> "In *N. L. R. B. v. A. S. Abell Company,* 323 F. 2d 1 at page 4 this Court held that common law tests are to be used to distinguish between 'employee' and 'independent contractor.' Although as we have pointed out, that case arose under the National Labor Relations Act, we perceive no valid reasons why the same tests are not applicable here" (Appendix A, p. 13a).

Despite the Amendments to the National Labor Relations Act in 1947, it is clear that the *Hearst* case approach is the

proper one in the determination of whether groups are employees under Federal antitrust law and the Norris-LaGuardia Act. See *Los-Angeles Meat and Provisions Drivers v. U. S.*, 371 U.S. 94, concurring opinion (p. 107) and dissenting opinion (pp. 108-109).

3. The decision of the Court of Appeals for the Fourth Circuit is not in accord with this Court's decisions in Local 24, *International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959); *Bakery Drivers v. Wohl*, 315 U.S. 769 (1942); and *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91 (1940) as well as with the decision of the Second Circuit in *Aetna Freight Lines, Inc. v. Clayton*, 228 F. 2d 384 (1955).

In each case the Court held that labor organizations may solicit and act on behalf of self employed entrepreneurs where the dispute affected working conditions in an industry. As Judge Sobeloff stated below:

> "The term 'labor dispute' can in some circumstances encompass disputes between suppliers of labor and purchasers of labor, regardless of the label attached to their relationship" (Appendix A, p. 26a).

The majority of the Court below, however, determined that despite the fact that there are union horseshoers who are clearly and concededly employees of rodeos and race tracks, the dispute between the farriers and the horsemen at the Maryland race tracks in no way concerns these employees, since for there to be a labor dispute under the Norris-LaGuardia Act the crux of the dispute must be the employer-employee relationship of someone.

It is submitted that this is in conflict with the cases and with Section 13(c) of the Norris-LaGuardia Act which states that the disputants need not "stand in the proximate relation of employer and employee." Appendix B,

p. 46a. The dispute involved terms and conditions affecting the entire industry of horseshoeing. It is erroneous to require that it immediately affect those who are employees in the industry.

CONCLUSION

It is important for "atypical" groups to know whether organization into labor unions will lead them into violations of Federal antitrust laws. The use of common law employer-employee definitions to govern the application of the antitrust laws not only jeopardizes such organizations but is in clear conflict with the broad policy of the Norris-LaGuardia Act and the decisions of this Court in the *Hearst* case and of other Circuits. This case is an appropriate vehicle for the determination of what tests should be applied under Federal labor policies.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

United States Court of Appeals
For the Fourth Circuit

No. 9310

A. Irwin Taylor, Carl F. Chapman, William Edmiston, James P. Simpson, Glenn C. Smith, and Harry S. Eklof,

Appellants,

versus

Local No. 7, International Union of Journeymen Horseshoers of the United States and Canada (AFL-CIO), an unincorporated association, Raymond P. Benton, John J. Meehan, John H. Bosley, and Robert E. Wheeler,

and

International Union of Journeymen Horseshoers of the United States and Canada (AFL-CIO), an unincorporated association,

Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore.
HARRISON L. WINTER, District Judge.

(Argued April 5, 1965. Decided November 5, 1965.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

H. Raymond Cluster (Cook & Cluster on brief) for Appellants, and Bernard W. Rubenstein (Jacob J. Edelman and Marshall A. Levin on brief) for Appellees.

BOREMAN, Circuit Judge:

These two cases were consolidated for disposition below and on this appeal. Plaintiffs are six trainers or owners of

thoroughbred race horses who race their horses at Pimlico, Bowie and Laurel flat tracks in Maryland and elsewhere in the United States and Canada. Three of the plaintiffs are residents of Canada.

The first action was instituted against Local No. 7, International Union of Journeymen Horseshoers of the United States and Canada (AFL-CIO) and certain of its individual members. The second action was instituted against the International Union of Journeymen Horseshoers of the United States and Canada (AFL-CIO). In both complaints the plaintiffs alleged that the defendants were engaged in a group boycott and price fixing in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and sections 4 and 16 of the Clayton Act, 15 U.S.C.A. §§ 15 and 26. Plaintiffs sought relief by way of permanent injunction, declaratory judgment and money damages.

In November 1963 the District Court, after taking evidence and after considering briefs and oral argument, entered a final order dismissing the complaints.[1] The court found that the alleged boycott and price fixing were per se violations of the Sherman Act, but held that the defendants were exempt from federal antitrust laws under sections 6 and 20 of the Clayton Act, 15 U.S.C.A. §§ 17 and 29 U.S.C.A. § 52, respectively, and that it lacked jurisdiction to grant the relief requested under provisions of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101 and 113, as the case involved a "labor dispute." In determining that the cases involved a "labor dispute" within the meaning of the Norris-LaGuardia Act, the court concluded as a matter of law that the horseshoers (hereinafter sometimes referred to as "farriers") who performed services for the plaintiffs were "employees" and not independent contractors.

Plaintiffs contend that the evidence did not support the District Court's conclusion but showed that the farriers were independent contractors and, as such, were not exempt

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[1] Taylor v. Local No. 7, Inter. U. of Journeymen Horseshoers, 22 F. Supp. 812 (D.C. Md. 1963).

from antitrust laws. Defendants on the other hand argue that the District Court was correct in its findings and conclusions; further, even if the farriers were independent contractors rather than employees, the cases still involve a "labor dispute" within the meaning of section 13 of the Norris-LaGuardia Act, 29 U.S.C.A. § 113. The latter question was not decided by the District Court in view of its determination that the farriers were "employees."

As trainers or owners of race horses the plaintiffs travel the racing circuit, going from track to track. Defendants, as horseshoers of thoroughbred race horses, often follow the same circuit. Consequently, the owners and trainers avail themselves of the services of several members of the defendant union.

The present controversy arose while plaintiffs were racing their horses at Bowie, Maryland. The three Canadian plaintiffs had used a nonunion member to shoe their horses in Canada. When plaintiffs arrived at Bowie, the farriers there refused to shoe any horses for them unless they signed an agreement to use only union members regardless of where the horses raced, either in the United States or Canada. The refusal by Local No. 7 to serve the Canadians was required by the International. The second question as to price fixing affected all the plaintiffs. Local No. 7 charged a minimum fee of $16 at Bowie for shoeing a race horse. This fee was set by the Local and any member who charged less than the minimum was subject to disciplinary action or possible expulsion by the union. The plaintiffs, as a result of the boycott and price fixing, instituted the present actions.

Defendants do not assert here that the boycotting and price fixing were not violations of the Sherman Act. The questions to be resolved by this court are whether there was substantial evidence to support the District Court's determination that the farriers were "employees" rather than independent contractors and whether an employer-employee relationship, as distinguished from that of employer-independent contractor, is necessary to constitute a "labor dispute" within the meaning of section 13 of the Norris-LaGuardia Act, 29 U.S.C.A. § 113.

The usual test employed for determining whether one performing services for another is an independent contractor or an employee is found in the nature and the amount of control reserved by the person for whom the work is done. The rule was clearly enunciated in *Singer Manufacturing Co. v. Rahn,* 132 U.S. 518 (1889). The Court at page 532 stated:

> "* * * The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished. * * *."

Complete control over the result to be accomplished is not enough to make an independent contractor an employee. As stated in *National Labor Relations Board v. Steinberg,* 182 F. 2d 850, 856-57 (5 Cir. 1950):

> "* * * an employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee."

Even some reservation of control to supervise the manner in which the work is done, or to inspect the work during its performance does not destroy the independent contractor relationship where the contractor is not deprived of his judgment in execution of his duties. *Conasauga River Lumber Company v. Wade,* 221 F. 2d 312, *cert. denied,* 350 U.S. 949 (6 Cir. 1955). The determination as to whether or not sufficient control has been retained rests upon the peculiar facts of each case and no one fact is controlling; the "totality of the circumstances must be considered." *N.L.R.B. v. A. S. Abell Co.,* 327 F. 2d 1, 5 (4 Cir. 1964).

The District Court recited certain facts upon which it based its conclusions with respect to the relationship between the owners and trainers and the farriers who served them. However, we think it necessary to consider the relevant attendant circumstances in their totality as clearly dis-

closed by the record. As this court stated in *N.L.R.B. v. A. S. Abell Company, supra,* 327 F. 2d 1, 4 (4 Cir. 1964), a case which arose under the National Labor Relations Act:

> "* * * Thus, the critical distinction between an independent contractor and an employee is found in the nature and amount of control reserved by the person for whom the work is done. The test, however, admits much more readily of statement than of application. Resolution of the question must depend largely upon the peculiar facts of each case. Moreover, no single factor is controlling and *the totality of the circumstances must be considered.*" (Emphasis supplied.)

In its opinion (222 F. Supp. 812, at 817-18), the District Court, in considering evidence of the present day relationship between farriers and trainers, deemed it helpful to refer to the original chartering of the defendant International Union in 1874, it growth to peak membership of 2500, the tremendous loss of members as the use of the horse for transportation ceased, the end of the public horseshoeing shop, the growth of racing of thoroughbred horses, the revived demand for farrier services and so on. At page 818 (after pointing out that there has arisen the so-called public trainer who, for a fee, will train and race horses of owners who own a small number of horses) the court below said:

> "* * * As a result, there are at the present time only fifteen to twenty horseshoers employed by private stables on a fulltime salary basis — the remainder, insofar as thoroughbred racing is concerned, perform their services on a piecework basis for a public trainer for the account of the owners whose horses he is training and racing."

The principal factual grounds relied upon by the court below to support its conclusions are (1) the right of the trainers to control the farriers' working time; (2) the right of the trainers to control each step of the horseshoeing process; (3) the continuing services the farrier is called

upon to render between shoeings; and (4) the fact that "the relationship, however denominated, between most trainers or owners and most farriers is a continuing one of indefinite duration and not sporadic and occasional." But we are persuaded from our examination of the testimony and the whole record that the court ignored other factors clearly appearing which are entitled to consideration in determining the employ or independent contractor status of the farriers.

The finding that the trainers control the working time of the farrier is, in our opinion, not supported by the record. The evidence is clear that the farriers do not work regular hours set by the trainers but work at their own convenience. At the start of a race meet, the trainer goes to the track's blacksmith shop (where the farriers gather) and contacts a farrier. The farrier works for more than one trainer as not one owner or trainer has enough horses to require full time services of a farrier. The trainer must seek out a farrier when shoeing services are needed and arrange, usually a day in advance, an appointment based on the farrier's scheduled commitments. The farrier is entirely free to decide how many days he will work in a week and the number of horses he will shoe in a day. The court below pointed to no evidence to the contrary but rested its conclusion of temporal control on the theory that the farrier is not really in control of his time because "there is economic pressure on him to work since a horseshoer works to support himself and his family, and not simply for his own amusement"; and that in deciding when to work, "a horseshoer is in the position of having to please the owner or trainer if he desires continued engagement, because the owner or trainer who is dissatisfied with the services of a particular farrier can, and does not hesitate, to replace him with somebody else." In this context we feel compelled to reject this line of reasoning. Pressures of economic necessity to work in order to provide for one's family and to accommodate the needs of the person who is paying for the services are applicable to every person engaged in a trade, calling or profession for gain and are not relevant considerations in determining whether one is an

employee or an independent contractor. It goes without saying that independent contractors, as well as employees, must work to support themselves and their families and must make themselves available to render services at such times as they are needed.

The court found that the trainers have the right to control "each step of the horseshoeing process." We must assume that in so finding the court meant the actual work of replacing the shoes on the horse, since it is clear that the trainer does not control in any way the *process* of making or altering shoes, the tools used, the price charged, or other such factors related to the "process." As to the limited process of the actual shoeing, a consideration of all the testimony indicates that instances of actual participation or exercise of control by trainers in the manner and means of accomplishing the shoeing, as distinguished from the end result, are limited to a few self-styled experts among the trainers; and that the almost universal practice of trainers is to entrust the actual shoeing of their horses to the expertise of the farriers and to concern themselves only with the *end result*.[2]

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[2] The distinction between the end result and the ways and means of accomplishment may well be demonstrated by the following: Many men prefer the same barber, returning time after time and at more or less regular intervals, even though the barber may change shops. Some barbers make appointments while others do not. Some are union members while other are not. A customer learns from experience that a certain barber can serve him acceptably and according to instructions. It may be that the customer wants clippers used on the sides of the head and on the back of the neck; another wants his hair trimmed only with scissors; another wants a "crew" cut; one wears his hair long another short; some want their eyebrows trimmed while others do not. The customers always assumes the right to direct the barber during the course of the hair-cutting operation — to take off here and there or leave portions untouched. The barber provides the tools and equipment and fixes his fees. The customer in each instance is interested in the end result even though directing certain ways and means of accomplishment. The barber strives to please in order to assure the customer's return. Obviously, the amount of retained control and right to direct does not convert the status of the barber from independent contractor to that of employee.

There is no doubt that the trainers told the farriers what they wanted and expected; they even checked during the shoeing process to see that their instructions were being followed. But a typical example of the sort of control exercised by the trainers is found in the testimony of farrier Raymond Benton, a witness for the defense.[3]

The continuing services supplied by the farrier between shoeings to which the District Court referred, as

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[3] "Q. Now, does each trainer retain the right to direct you with with respect to how much to cut or the type of shoe to put on? A. Yes. You have occasions that you might shoe a horse one day and you might not do it just right, and the trainer will tell you, maybe you took too much off or maybe you didn't take enough off, how about adjusting the foot or something to make it — try to make it the same or whatever he wants."

* * * * * *

"Q. On any of the things you have mentioned, what tools you use or where you place the horse or which way he is facing, do you get specific instructions about that from the trainer or assistant trainer, or do you use your own judgment on that? A. A lot of times, they'll tell you that this horse will stand good in the stall, this horse will stand good outside, maybe we'd better take him to another barn or leave him in the stall or turn him around or — the whole time.

"Q. And after you get him standing, what do you do then? A. Pull the shoe off, trim the foot.

"Q. Now, do you receive instructions as to how to pull the shoe off? A. No.

"Q. And what about trimming the foot? A. That's basically what you get back to is some don't like high heels on a horse. They want the heels cut down. Some want a short toe, some like for the toe to grow out longer, at a different angle. Some don't want the frog touched. Some don't want the sole touched.

"Q. Well, now you indicated that those kinds of instructions are given to you by the trainer at the time he decides to use your services. At the beginning, he tells you those kinds of things. I like the toe short or I like it high or low or whatever.

Now, do you tell me that he repeats that instruction to you every time you come into there and shoe his horse? A. Well, if you go back and he happens to see a horse that is not shod to his liking, he'll tell you, I think you have missed this horse, maybe do something else to him, or change him."

testified to by witnesses Miller and Simpson, amount to no more than making minor adjustments as necessary or replacing the shoe if it comes off. In other words, the farrier must stand behind his work just as any other craftsman must if he expects to retain customers, and this is no more characteristic of an employee than an independent contractor. It is clear from the record that the trainer is not entitled to the continuing general services of the farrier between shoeings; if any substantial changes or additions are required, the farrier is contacted, his services are obtained, and he is paid in the usual manner.

Finally, the court below found that the relationship between trainer and farrier is a continuing one of indefinite duration rather than occasional or sporadic. In some instances it is true that a trainer will use the services of the same farrier over an entire racing meet or season, or even a period of years, if the farrier sees fit to be at the same track and to agree to perform the services. However, the fact is that the services are performed only occasionally and as needed. In other instance, particularly in the case of trainers who have only a small number of horses and who find it difficult to obtain the services of a farrier, the relationship is even much more sporadic. Mr. Simpson, with a large stable of horses and an obvious preference for a continuing relationship, changed farriers on several occasions. Farrier Benton, who did work for Simpson, shod only twenty Simpson horses during portions of nine separate days over a thirty day period. It is true that Benton maintained his own records on each horse and periodically returned to reshoe the horses without specific requests. But this was exceptional and was not the usual custom. Mr. Chapman used all the available farriers in Maryland, not any particular one. In any event, the relationship between farrier and trainer is clearly much less continuous or permanent than that between the publisher and carrier in *N.L.R.B. v. A. S. Abell Compay*, 327 F. 2d 1 (4 Cir. 1964), in which this court found this factor not indicative of an employer-employee status in view of the total situation.

In its published opinion[4] the District Court quoted 1 Restatement, Agency 2d (1958 Ed.) § 220(2), (a) through (j), wherein are set forth certain matters of fact which, among others, are to be considered in determining whether one acting for another is "a servant [employee] or an independent contractor." Opposed to the four principal factors relied upon by the court below in the instant case to support its finding of employer-employer status are the following factors clearly established by the evidence, some or all of which are considered by the courts, including this court in the *Abell* case *supra*, and the Restatement, to be criteria supporting a finding of independent contractor status:

(1) The farrier's income is dependent, at least to some extent, on factors which are without the control of the trainer. In addition to the farrier's sole determination of when, where, how long and for whom he will work, he controls his own income through his complete control of the price of his services and the risk of profit and loss involved. The District Court found that the farriers sell shoes at cost without calculating a profit on resale. This is generally true when a certain type shoe is used but the evidence disclosed the practice of manufacturing various types of steel shoes in volume for later sales to trainers. Error of judgment in the amounts and types of shoes manufactured by the farriers could clearly result in profit or loss and in this respect they run the same risk as any manufacturer. The price they pay for their tools, the type of tools purchased, the cost of printed billheads, the type of car or truck used for travel from one track to another and the cost of maintenance and operation, are all variables which affect income. In addition, the individual farrier decides for himself whether to employ an apprentice and it was shown that employment, at fixed wages, of an apprentice is quite expensive and is of no real advantage to a farrier;

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[4] 222 F. Supp. 812, 821 (n. 4). The District Court did not, however, quote the "Comment on Subsection (2)": "(h) Factors indicating the relation of master and servant," and (i) which states that the custom of the community as to the control ordinarily exercised in a particular occupation is of importance.

consequently, employment of an apprentice means a reduction in net income.

(2) Farriers provide their own tools.

(3) Farriers are highly skilled, and horseshoeing is a distinct occupation or business.

(4) Farriers are paid by the job and not by the hour week or month. "Piece rate" employees, working on an incentive plan, ordinarily receive a minimum guaranty for a specified number of hours worked per week regardless of the number of "pieces" completed; and their hours of work are established and controlled by their employer.

(5) Farriers do not work regular hours or in full time employment with one employer.

(6) Farriers regard themselves as independent, contractors. This is indicated by their printed billheads, employment of apprentices, reference in their constitution to trainers as "customers," unilateral price-fixing, and unilaterial establishment of work rules, hours of work and bill collection methods.

(7) Trainers regard farriers as independent contractors. They make no deductions for social security or income taxes, and carry no workmen's compensation insurance on the farriers as they do for their grooms. They regard farriers as specialists, similar to veterinarians. They do not keep records of their hours for any purpose.

(8) Farriers decide whether to demand cash payment or extend credit, and they have established a bill collection procedure through their rule that one will not perform services for any trainer who owes money to another farrier.

(9) Some farriers receive retainers from trainers to guarantee first call on the farrier's services. The payment of a "retainer" for this purpose is clearly indicative of an independent contractor status—not an employee status; and the fact that without the payment of a retainer, the trainer has no assurance that the farrier will serve him, certainly

negates the idea that the farrier is his employee. If two trainers wish the services of the same farrier at the same time, it is the farrier who decides for whom he will work.

(10) The "custom of the community" supports the conclusion that the farriers are independent contractors. Analogies to the relationship between the trainer and the farrier are numerous and the court will take judicial notice of the fact that no employer-employee relationship is created in these analogous situations. The individual painter, plumber, roofer, electrician, dressmaker, television repairman and a host of others who come to one's home to perform services, who are told when they may come, what they are to do, what kind of fixture to install, what color and brand of paint to use, whose work is subject to on-the-spot suggestion, criticism and disapproval, and with whom a more-or-less continuing relationship is often maintained, do not become the employees of the householders who contract with them to perform these various services at which they are skilled. They are independent businessmen in the eyes of the community, and so too, we conclude, are the farriers with their particular skills, individual business billheads and freedom to work when and where and at the price they please.

It is most unlikely in any relationship that *all* of the criteria listed as relevant by the courts and Restatement will point in one direction or the other; in each case a balancing and judging of the various factors in the light of the total situation must be accomplished in order to reach a reasonable result. A consideration of the total picture here forces us to the conclusion that the criteria pointing to independent contractor status of the farriers overwhelmingly outweigh, both qualitatively and quantitatively, those criteria which point to employee status. If there is one single aspect of the evidence which points up most dramatically how different from employees are these farriers in relation to the trainers, it is found in the facts that the trainers do have employees, the grooms, and some farriers do work as salaried employees for the tracks. There is a vast dissimilarity between the status of a groom or track-employed farrier and the status of a farrier per-

forming the services herein described for a trainer or owner.

We are not unmindful of the rule that erroneous conclusions of law may always be set aside while findings of fact, to be rejected on appeal, must be "clearly erroneous" and that a finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Smith v. United States,* 336 F. 2d 165, 168 (4 Cir. 1964). We have such a firm conviction here with reference to the findings upon which the court relied so heavily. In *N.L.R.B. v. A. S. Abell Company,*[5] this court held that common law tests are to be used to distinguish between "employee" and "independent contractor." Although, as we have pointed out, that case arose under the National Labor Relations Act, we perceive no valid reason why the same tests are not applicable here. We are persuaded that the court erred in concluding, as a matter of law, that the defending farriers are "employees."

We find no case decided in the courts of the United States in which the relationship such as here existing between farriers and trainers has been considered. The District Court, recognizing that rarely are any two cases alike on their facts, discussed certain decisions of the Supreme Court of the United States and undertook to follow the principles therein determined to be applicable on the recited facts. We shall not do more than advert to the discussion below since we do not find it persuasive in light of the facts and circumstances of the instant case, considered in totality.

The lower court considered but declined to follow a decision of the Ontario Labour Relations Board in International Union of Journeymen Horseshoers, Local No. 20, and Merrill, et al.[6] It appears that Keyruze, president of Local No. 20 of the International, and Smith, first vice

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[5] 327 F. 2d 1, at page 4.

[6] Cited in appellants' brief as James Smith and Samuel Keyruze. May 1963, O.L.R.B. Monthly Reports, 112.

president of the International and a member of Local No. 20, filed complaints with the Ontario Labour Relations Board charging that certain owners and trainers in Canada had discriminated against them (after they had instigated the boycott against the Canadian plaintiffs in Maryland) in violation of section 65 of the Ontario Labour Relations Act. The proceeding turned on whether the complainants were independent contractors and, as such, unable to invoke the protective provisions of the Canadian Act. They were horseshoers whose relationship with the owners and trainers were substantially the same as the relationship between the farriers and trainers in the instant case. The Board said:

> "* * * we are constrained to find that James Smith and Samuel Keyruze are independent contractors. While the services rendered by these blacksmiths are customarily restricted to persons engaged in horse racing, and not infrequently for extended periods to the same persons, their services are with respect to, and result entirely from independent and individual contracts. Their services are not rendered as employees under a contract of employment but as independent craftsmen who at all times remain their own masters as to when, how and for whom they will work and for how much."

The term "employee" was not defined in the Act there involved and the Board looked to the general or common law, not only of Canada but of the United States as indicated by certain references contained in its opinion. Of course, that decision is not binding in any way upon this court but it is reassuring since our conclusions are not in conflict therewith. If we were to hold that the farriers are employees, horseshoers, when performing the same services in the same way for the same people, would be independent contractors in Canada and "employees" in the United States — an incongruent result, to say the least.

We next consider the contention of the defendants that even though the farriers are not "employees" of the trainers, they cannot be enjoined from engaging in their

activities of boycotting and price-fixing because this case involves or grows out of a "labor dispute" within the meaning of the Norris-LaGuardia Act of 1932. As we earlier noted, the District Court concluded that it was unnecessary to decides this point.

Section 1 of the Norris-LaGuardia Act, 29 U.S.C.A. § 101, deprives courts of the United States of jurisdiction to issue an injunction "in a case involving or growing out of a labor dispute except in strict conformity with the provisions of this chapter."

Section 13 of the Norris-LaGuardia Act, 29 U.S.C.A. § 113, defines terms and words used in 29 U.S.C.A. Chapter 6.[7]

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[7] Portions of 29 U.S.C.A. § 113 are set out below.

"§ 113. Definitions of terms and words used in this Chapter.

"When used in this chapter, and for the purposes of this chapter—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (Emphasis added.)

Difficult questions as to the application of the anti-trust laws to the activities of labor unions and the accommodation of the apparently conflicting federal policies in the area of restraint of trade and labor-management relations in the Sherman, Clayton and Norris-LaGuardia Acts have been presented to the courts over the years. The history of the application of the Sherman Act to union activities and of the subsequent passage and judicial interpretation of the Clayton and Norris-LaGuardia Acts is well summarized by Mr. Justice Black in *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945):

The parties here agree, and the court below correctly stated, that since the decision in *United States v. Hutcheson*, 312 U.S. 219 (1941), it is well settled that provisions of the Sherman, Clayton and Norris-LaGuardia Acts must be considered together in determining the scope of the exemption of union activities from the antitrust provisions; and, in the light of such consideration, the test to be applied in determining whether such activities are exempt is whether they present a case which can be said to involve or grow out of a "labor dispute."

Section 20 of the Clayton Act (29 U.S.C.A. § 52) provides that no restraining order or injunction shall be granted by any court of the United States in any case between certain named classes of parties involving, or growing out of, a dispute concerning terms or conditions of *employment* but it does not define "a dispute concerning terms or conditions of employment." The purpose of Congress in enacting the Norris-LaGuardia Act was to obviate the results of judicial construction which had been given the Clayton Act, including section 20 thereof, to express the public policy of the United States and to define the congressional conception of a "labor dispute" in terms that "no longer leave room for doubt."[8] "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act."[9]

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[8] United States v. Hutcheson, 312 U.S. 219, 234.
[9] Id. at 236.

Now, however, in considering the sharply conflicting contentions of the parties here with respect to the meaning of "labor dispute" as defined in section 13(c) of the Norris-LaGuardia Act (chapter 29 U.S.C.A. § 113(c)), which definition was so optimistically depictured in 1941 as no longer leaving "room for doubt," we find that we must still look for judicial guidance in striving to properly interpret and apply section 113 to the facts of this case.

Our attention is directed to the case of *Columbia River Co. v. Hinton*, 315 U.S. 143 (1942). There the Pacific Coast Fishermans' Union, a CIO affiliate, had a provision in its constitution and by-laws that union members should not "deliver catches [of fish] outside of Union agreements" and union fishermen refused to sell fish to buyers who did not agree to purchase fish exclusively from union members at prices established by the union. Upon the refusal of Columbia River Packers Association, a buyer, to sign such an agreement, the union induced its members to refrain from selling fish to the Association. In defending a charge of antitrust violations, the union claimed exemption under the Clayton and Norris-LaGuardia Acts. The Supreme Court, denying the exemption, noted that the controversy was between businessmen over a contract concerning sales of fish and held that there was no labor dispute because there was no employer-employee relationship affected by or involved in the controversy. The Supreme Court there reversed the Ninth Circuit Court of Appeals[10] which had held that the District Court erred in granting an injunction since involved was a controversy concerning terms or conditions of employment included in the term "labor dispute." The Court of Appeals (117 F. 2d 310, at 313), after reciting dictionary definitions of the word "employment," said:

> "It can be seen that if the word 'employment' is used in several of the senses above mentioned, it is broad enough to cover the situation disclosed here. 'The words of a statute are to be read in their meaning and ordinary sense, giving them a meaning

[10] Hinton v. Columbia River Packers Ass'n, 117 F. 2d 310 (1941).

> to their full extent and capacity, unless some strong reason to the contrary appears.' * * * We are unable to find any indication that Congress gave the word a restricted meaning."

The Supreme Court, 315 U.S. 143, at 146-147, in reversing the Court of Appeals, stated:

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute, may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. Our decisions in *New Negro Alliance v. Grocery Co.*, 303 U.S. 552, and *Milk Wagon Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, give no support to the respondents' contrary contention, for in both cases *the employer-employee relationship was the matrix of the controversy.*" (Emphasis added.)

> "The controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer, nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise. That some of the fishermen have a small number of employees of their own, who are also members of the union does not alter the situation. For, the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours, or other terms and conditions of employment, of these employees."

In *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), to which the Supreme Court adverted in its decision in the *Columbia River* case, an association of Negroes and its officers sought to have Retail Grocery Store Company adopt a policy of employing Negro clerks in certain of its stores. The Alliance undertook to picket

to force the Grocery Company to hire Negroes, to make them *employees*. The Court held that the members of the Negro organization were "persons interested" in a labor dispute between them and the company within the meaning of the Norris-LaGuardia Act, notwithstanding the absence of employer-employee relationship and notwithstanding the fact that the organization and its officers were not engaged in the same business as the company or in a competing business. The Supreme Court noted that the Court of Appeals thought that the dispute was not a labor dispute within the meaning of the Act because it did not involve terms and conditions of employment such as wages, hours, unionization, or betterment of working conditions, and that the trial court had jurisdiction to issue an injunction. However, the employer-employee relationship was found to be the matrix of the controversy. At 303 U.S. 559 and 560, the Court stated:

> "* * * We think the conclusion that the dispute was not a labor dispute within the meaning of the Act because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."

The second case mentioned by the Supreme Court in the above quotation from the *Columbia River* decision is *Milk Drivers' Union v. Lake Valley Co.*, 311 U.S. 91 (1940). There a union of milk wagon drivers, employed by local dairies in delivering milk from door to door to retail customers, picketed a number of retail stores which sold, at cut prices on the cash-and-carry plan, milk bought at wholesale from individuals called "vendors," who delivered it by their own trucks from supplies bought from other dairies under arrangement whereby their supplying dairies accepted the return of unsold milk at full purchase price. This "vendor" system had made inroads on the business of union dairies and affected unfavorably the wages and employment of members of the drivers' union. Claiming unfair competition, the drivers' union sought, through picketing, to compel the "vendors" to join it for the purpose of improving their wages and working conditions. Two

of the cut-price dairies, an industrial union (organized by their employees, including "vendors") and an out-of-state cooperative association supplying milk joined in a suit charging the drivers' union and its officers with violation of the Sherman Act and seeking an injunction against picketing and acts of violence. There was evidence to show that the plaintiff industrial union had a contract with each of the plaintiff dairies providing that the term "employee" as used in such contract means all wholesale and retail route salesmen or driver, their helpers and assistants, all milk distributors referred to as "vendors" and all persons employed in the sale and distribution of the employer's products; and each contract provided for a closed shop, giving to plaintiff union the exclusive right to represent all the employees, including vendors, for purposes of negotiating on all questions of wages, hours and conditions of employment that should prevail in the employer's business. The Court held that the case arose out of and involved a "labor dispute"; that all of the parties had direct or indirect interests in the production, processing, sale and distribution of milk; that the Norris-LaGuardia Act applies to "labor disputes" between persons who are engaged in the same industry, trade, craft or occupation, or have direct or indirect interests therein. The Court reached the conclusion that the relationship of employer-employee was the "matrix" of the controversy. (See *Columbia River Co. v. Hinton*, 315 U.S. 143, 147, for the Court's explicit declaration of the basis of its holding in *Milk Wagon Drivers' Union v. Lake Valley Co., supra.)*

In *American Medical Association v. United States*, 317 U.S. 519 (1943), the A.M.A. and the Medical Society of the District of Columbia (hereinafter called the accused) were convicted of conspiring to violate the Sherman Act. A non-profit corporation, Group Health, had been organized by government employees to provide medical and hospital care on a prepayment plan and employed full-time physicians on a salary basis. The accused, certain individuals some of whom were their own officers or employees, and some of their members who were practicing physicians, sought, among other things, to coerce other of accused's

physician members from accepting employment under Group Health, to prevent accused's members from consulting with Group Health's doctors who might desire consultation, and to prevent hospitals in and about Washington from affording facilities for the care of patients of Group Health's physicians. The Court assumed that doctors who had contracts with Group Health were employees of that corporation. It was argued that there was a dispute concerning terms and conditions of the employment of doctors in which the accused were interested; that when a committee of the D. C. Medical Society first conferred with representatives of Group Health, a controversy arose, the matrix of which was the terms and conditions of employment by Group Health of members of the District Society to perform Group Health's medical work; that Group Health rejected an offered basis of employment of members of the District Society and insisted upon dictating the terms and conditions of such employment and method of payment of compensation. The Court held that the accused did not represent employees, either present or prospective; that their purpose was to prevent anyone from taking employment under Group Health; the accused "were not an association of employees in any proper sense of the term. *They were an association of individual practitioners each exercising his calling as an independent unit.* [Emphasis supplied.] These independent physicians, and the two * * * associations which represent them, were interested solely in preventing the operation of a business conducted in corporate form by Group Health. In this aspect the case is very like *Columbia River Packers Assn. v. Hinton*, 315 U.S. 143." (317 U.S. at 536.) The Court concluded that no labor dispute was involved and the activities of the accused were not protected by the Clayton and Norris-LaGuardia Acts.

From its study of the Clayton and Norris-LaGuardia Acts and the interpretation of those two acts by the courts, the trial court concluded, and we agree, that boycotting and price-fixing activities, such as those engaged in by the defendants in the instant case, would be exempt from operation of the antitrust laws (1) if the parties to a

dispute stand in the relationship of employer and employee and dispute some aspect of that relationship, or (2) if the employer-employee relationship of others is the crux of the dispute between the parties.

We have determined that the disputants here, the farriers (and their unions) and the complaining owners and trainers do not stand in the proximate relation of employees and employers. But the defendants contend that, even if the farriers are not employees of the plaintiffs and other similar owners and trainers, their activities with respect to the plaintiffs involve a labor dispute and are exempt from antitrust restrictions since they work at times as common law employees of the race tracks, other horseshoer members of the union work at times as employees of rodeos and annual trail rides and, since they are all members of the same union and engaged in the same industry, trade, craft or occupation, the defendants' activities with relation to the owners and trainers in some way involve or affect the employer-employee relationship between horseshoers, on the one hand, and race tracks, rodeos and trail rides on the other. We think this contention is without merit and must be summarily rejected.

There is no evidence in the record that the boycotting and price-fixing activities of the defendant unions were undertaken in aid of or in connection with the wages, hours, working conditions or any other interest of horseshoers performing services for race tracks, rodeos or any other persons other than trainers and owners of race horses who are in every way similar to the plaintiffs here. There is no evidence to even suggest that the boycotting of the Canadian trainers for the purpose of requiring them to use the services of union members in Canada had, or was intended to have, any effect on horseshoers employed by race tracks or other employers in Canada or elsewhere. Here the horseshoers are not attempting to force the owners and trainers to use any of them as employees, nor are the unions attempting to organize any employees of the trainers or owners. The defendants are seeking to coerce the plaintiffs into using, exclusively, the services of the union members who are independent contractors, not employees.

It is not disputed that the employer-employee relationship exists between the management of race tracks and rodeos and some union members but no controversy exists concerning that relationship. An employer-employee dispute is nowhere involved. The only interests sought to be advanced by the activities of these defendants are the interests of those independent horseshoers who render services to trainers and owners for a certain fee, unilaterally fixed per horse. They are independent businessmen, specialists in their line, who have banded together and who act in concert for their mutual benefit and improvement. We fail to discover the existence of any employer-employee relationship which is the "matrix" of this controversy or any condition which, under the provisions of either the Clayton Act or the Norris-LaGuardia Act, would protect the activities of the defendants.

It follows from what we have said that the District Court erred in determining that it lacked jurisdiction to grant injunctive relief and in dismissing the complaints. The cases will, therefore, be remanded for appropriate proceedings below.

Reversed and remanded.

SOBELOFF, Circuit Judge, with whom JUDGE BELL joins dissenting:

These appeals had their origin in a dispute between the International Union of Journeymen Horseshoers of the United States and Canada (AFL-CIO) and nine owners and trainers of thoroughbred race horses.

One aspect of the controversy arose when three of the Canadian owners and trainers, while in Canada, used a Canadian nonunion farrier to shoe their horses. Later when they brought their horses to a racing meet at Bowie, Maryland, the International Union required its Local No. 7 to refuse service to the Canadians unless they would sign an agreement to use only union members, both in the United States and Canada. The other aspect of the case affecting

all of the plaintiff owners and trainers sprang from the local union's setting of a minimum charge at Bowie of $16 for the shoeing of each race horse. The local enforced this policy by threatening to discipline or expel any union member who charged less than this minimum price.

The owners and trainers brought two actions in the District Court — one against the International Union, the other against the local. In both actions they alleged that the defendants were engaged in a group boycott and price fixing in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 & 2, and sections 4 and 16 of the Clayton Act, 15 U.S.C.A. §§ 15 & 26, and sought a permanent injunction, declaratory judgment and money damages.

The unions' defense was that this was a "labor dispute" as defined by section 13 of the Norris-LaGuardia Act, 29 U.S.C.A. § 113, construed in light of section 20 of the Clayton Act, 29 U.S.C.A. § 52, and that sections 4 and 7 of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 104 & 107, therefore deprived the court of jurisdiction to issue the requested injunction. From this it would follow, under the Supreme Court's decision in *United States v. Hutcheson*, 312 U.S. 219 (1941), that the unions' conduct was not violative of the antitrust laws, and hence plaintiffs were not entitled to any of the remedies sought.

The District Court concluded that the horseshoers are "employees" of the owners and trainers, and that the case thus involved a "labor dispute" within the definition of section 13(a) of the Norris-LaGuardia Act, 29 U.S.C.A. § 113(a). The court therefore found it unnecessary to deal with the unions' further argument that, whether the men are employees or not, this is in any event a "labor dispute" within the meaning of section 13(c) of the Norris-LaGuardia Act, 29 U.S.C.A. § 113(c), and dismissed both complaints.

The District Court's finding that the horseshoers are employees has ample support in the record and is not clearly erroneous. For the reasons fully set forth in the opinion of District Judge Winter, and which need not be repeated

at length. I would affirm. See *Taylor v. Local No. 7, International Union of Journeymen Horseshoers*, 222 F. Supp. 812 (D. Md. 1963).

Moreover, even if appellants are deemed to be independent contractors, the court is not at liberty to disregard the Norris-LaGuardia Act. The Act defines "labor dispute" in the following manner:

> "The term 'labor disputes' involves any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" 29 U.S.C.A. § 113(c). (Emphasis added.)

Fairly construed, the statutory definition is broad enough to cover the situation disclosed here — an effort by the farriers to compel the owners and trainers to use only union members, and to get $16 for shoeing each race horse. As I read *Columbia River Packers Ass'n, Inc. v. Hinton*, 315 U.S. 143 (1942), reversing *Hinton v. Columbia River Packers Ass'n, Inc.*, 117 F. 2d 310 (9th Cir. 1941), the Supreme Court did not disapprove a similar interpretation of the statute by the Ninth Circuit, but simply held that "[t]he controversy here is altogether between fish sellers and fish buyers * * * relating solely to the sale of fish" and not relating to "terms and conditions of employment * * *." The value of the horseshoe included in the $16 shoeing charge is not sufficient, in my opinion, to bring the controversy within *Columbia River*.

The dispute between the farriers and the owners concerns the reward paid the farriers for their labor. The refusal to handle the Canadians' horses grows out of the latter's use of labor which undercut wage standards the union deemed fair. The defendants' conduct involves nothing more than the withholding of their labor in order to coerce the owners to have all work performed under minimum union standards. Such a withholding of labor does not

violate the antitrust laws, see *Hunt v. Crumboch*, 325 U.S. 821 (1945). It falls rather within the definition of a labor dispute prescribed in the Norris-LaGuardia Act, even in the absence of any employer-employee relationship either between the parties directly or with anyone else. *Aetna Freight Lines, Inc. v. Clayton*, 228 F. 2d 384 (2d Cir. 1955).

In *Aetna Freight* the Teamsters demanded that the trucking company enter into a collective bargaining agreement with it as the representative of the owner-operators of the company's leased trucks. When the company refused, the Teamsters picketed the premises of the company and its customers. In reversing the lower court's order enjoining the picketing, the court, through Judge Clark, said that the union was attempting to enforce uniform terms for drivers and helpers in the steel hauling industry in the Buffalo area.

> "Neither the fact that persons working for Aetna may be independent contractors nor the fact that Aetna's dispute was with an organization of persons not its employees would be sufficient to remove this controversy from the broad definition of § 13 of the Norris-LaGuardia Act * * * [T]he efforts of the Union to secure more uniform observance throughout the industry of the working conditions enjoyed by its members was a labor matter; and this controversy arising directly from such effort was a 'labor dispute' within the meaning of the Act." 228 F. 2d at 387.

The term "labor dispute" can in some circumstances encompass disputes between suppliers of labor and purchasers of labor, regardless of the label attached to their relationship.

My conclusion therefore is that the District Court should be affirmed in its holding that an employer-employee relationship exists, and I reach the same result apart from the question of the existence of such relationship because the Norris-LaGuardia Act denies federal court jurisdiction to issue an injunction in these circumstances.

OPINION OF DISTRICT COURT

WINTER, District Judge:

In Civil No. 14426, plaintiffs, a group of horse trainers and owners, some of whom are citizens of the Dominion of Canada, sue *inter alia*, to enjoin defendants, all of whom are horseshoers at thoroughbred flat race tracks in Maryland and elsewhere, and the local of the union of which defendants are members, and its officers, from engaging in price-fixing and from refusing to shoe certain plaintiffs' horses unless the plaintiffs agreed to use exclusively union horseshoers wherever available when they race their horses in the United States and the Dominion of Canada. Plaintiffs allege that such actions are in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and are instituted pursuant to §§ 4 and 16 of the Clayton Act, 15 U.S.C.A. §§ 15 and 26. Coupled with their claim for injunctive relief, plaintiffs pray, also, for declaratory judgments and money damages. In Civil No. 14524 the International Union with which Local No. 7, one of the defendants in Civil No. 14426, is affiliated, is also sued for the same reasons. The cases were consolidated. A preliminary hearing on plaintiffs' request for a temporary restraining order was held, at which affidavits and testimony were presented. At the conclusion of the hearing, defendants agreed to discontinue their boycott of the plaintiffs pending final adjudication of the case, and no order was entered. The matter was then set for hearing on permanent injunction, evidence taken, and the case briefed, argued and submitted.

The evidence fairly showed that plaintiffs were trainers, and some were owners, of thoroughbred race horses, and that they race their horses at Pimlico, Bowie, and Laurel flat tracks in Maryland, and elsewhere, including other states and the Dominion of Canada. The individual defendants were all horseshoers and were licensed to perform, and did perform, horseshoeing services at the Maryland tracks and elsewhere. In order to perform horseshoeing services at a Maryland race track, a person must be the

holder of a farrier's license issued by the Maryland Racing Commission. In order to obtain such a license for a flat track (but not a harness racing track), other than by a grandfather grant, the applicant must successfully pass an examination testing his skill of performance administered by persons, all of whom are members of defendant, Local No. 7. All farriers at Maryland flat tracks are members of defendant, Local No. 7.

The individual defendants, acting individually and as officers of defendant, Local No. 7, and Local No. 7, fix minimum prices for the performance of horseshoeing services at Maryland flat tracks. A trainer or owner cannot have his horses shod at a price less than this minimum. Failure to charge the minimum price by a member of Local 7 would subject the member to disciplinary action and possible expulsion from the union.

Plaintiffs, A. Irwin Taylor, Carl F. Chapman and William F. Edmiston (hereafter called "Canadian plaintiffs") are all residents of the Dominion of Canada and regularly race horses at various race tracks in Canada and the United States. The Canadian plaintiffs have been requested in Canada, where not all race track farriers are union members, to enter into agreements to employ only farriers who are union members in Canada and elsewhere where they race. The request has been made by persons who are members and representatives of Local No. 20, an affiliate of defendant. International Union of Journeymen Horseshoers of the United States and Canada (AFL-CIO) and a sister local to defendant, Local 7. The Canadian plaintiffs have refused to enter into such an agreement. Local No. 20 thereupon requested Local No. 7 to withhold services to the Canadian plaintiffs when the latter raced horses at tracks within the geographical jurisdiction of Local No. 7. After consideration, Local No. 7 acceded to the request and, beginning with the Maryland racing season in the fall of 1962, and continuing until the voluntary lifting of the boycott in this case, the Canadian plaintiffs, except Carl F. Chapman, could not obtain horseshoeing services at Maryland race tracks, except by arranging to have their

horses trained and run, at least nominally, under the name of another trainer, against whom Local No. 7 was not conducting a boycott. Mr. Chapman, after initially being refused horseshoeing services, signed the requested agreement, and one of the members of Local No. 7 resumed shoeing Mr. Chapman's horses.

There is little question but that the activities of the defendants, both in price fixing and in conducting a boycott, violate the federal antitrust laws unless the defendants' activities are otherwise exempt.[1] Price-fixing has long been held to be *per se* an unreasonable restraint of trade and, therefore, a violation of the Sherman Act, *United States v. McKesson & Robbins,* 351 U.S. 305 (1956); *United States v. Real Estate Boards,* 339 U.S. 485 (1950); and *U. S. v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Similarly, a refusal to deal and group boycotts violate the Sherman Act, *Meat Drivers v. United States,* 371 U.S. 94 (1962); *Klor's v. Broadway-Hale Stores,* 359 U.S. 207 (1959); *Northern Pac. R. Co. v. United States,* 356 U.S. 1 (1958); *Columbia River Co. v. Hinton,* 315 U.S. 143 (1942).

Defendants contend that such egregious conduct on their part is exempt from federal antitrust prohibitions. They point to § 6 of the Clayton Act, 15 U.S.C.A. § 17, which states:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for

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[1] At the hearing on plaintiffs' request for a temporary restraining order, defendants contended that plaintiffs' activities were not interstate in nature, and that the federal antitrust laws were, therefore, not applicable. This contention has been abandoned at final hearing. The federal antitrust laws will, therefore, be treated as applicable. See *Yonkers Raceway v. Standardbred Owners Ass'n,* 153 F. S. 552 (D.C. S.D. N.Y. 1957) as an authority holding that the activities of owners and trainers like those in the instant case constitute interstate commerce.

> profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

and § 20 of the Clayton Act, 29 U.S.C.A. § 52, which limits the granting of injunctive relief.[2] Additionally, defendants invoke the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101, *et seq.*, which removed from courts of the United States jurisdiction to issue restraining orders or temporary or permanent injunctions in cases involving or growing out of a labor dispute, except under certain prescribed conditions. Specifically removed from jurisdiction are the acts set

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[2] "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to obstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

forth in § 4 of the Norris-LaGuardia Act, 29 U.S.C.A. § 104, as follows:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction *in any case involving or growing out of any labor dispute*[3] to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * *
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified;" (Emphasis supplied.)

Since the decision in *United States v. Hutcheson*, 312 U.S. 219 (1941), the law has been settled that the provisions of the Sherman Act, the Clayton Act and the Norris-LaGuardia Act must be considered together in determining the scope of the exemption of union activities from antitrust prohibitions, with the result that activities with regard to which the Norris-LaGuardia Act removes jurisdiction to enjoin are rendered substantively valid under the Sherman Act. To the same effect, see *Hunt v. Crumboch*, 325 U.S. 821 (1945); *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945); and *Columbia River Co. v. Hinton, supra.* See also, *Meat Drivers v. United States, supra.*

But the validating effect of the Norris-LaGuardia Act has limits also. Where a union and its members combine with non-labor groups to monopolize a market and to fix prices

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[3] § 13(c) of the Norris-LaGuardia Act, 29 U.S.C.A. § 113(c) defines "labor dispute" for the purposes of the Act to mean:

> "* * * any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

of a product, such conduct has been held to violate the antitrust laws, *U. S. v. Employing Plasterers Assn.*, 347 U.S. 186 (1954); *U. S. v. Women's Sportswear Assn.*, 336 U.S. 460 (1949); and *Allen Bradley Co. v. Union, supra,* and where the activity complained of was, in fact, that of individual businessmen fixing the price of a product, even though denominated that of a union, the antitrust exemption has been held not available to them, *Meat Drivers v. United States, supra; Columbia River Co. v. Hinton, supra.* See also, *American Medical Assn. v. U. S.*, 317 U.S. 519 (1943).

The basic test to determine whether the Clayton and Norris-LaGuardia Acts validate any given activity otherwise condemned by the Sherman Act stems from the language of § 20 of the Clayton Act, 29 U.S.C.A. § 52, and §§ 4 and 7 of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 104 and 107, in the light of the definition of "labor dispute" as contained in § 13(c) of the Norris-LaGuardia Act, 29 U.S.C.A. § 113(c). Consistent with repeated use of the words "employee," "employer," and "employment," the Supreme Court, in *Columbia River Co. v. Hinton, supra,* has said (p. 147): "* * * the employer-employee relationship was the matrix of the controversy." See also, *Hawaiian Tuna Packers v. International L. and W. Union,* 72 F.S. 562 (D.C. Hawaii 1947). Stated otherwise, if the parties to a dispute stand in the relationship of employer and employee and dispute some aspect of that relationship, or if the employer-employee relationship of someone else is the crux of the dispute between the parties, activities like those in the case at bar are validated by the Norris-LaGuardia Act.

Applying that test, plaintiffs contend that the individual defendants do not stand in the position of employees in a relationship of employment to the plaintiffs, or those similarly situated, as employers. Hence, they assert price-fixing and boycotting on the part of the defendants does not involve or grow out of any labor dispute, so that such activities are not rendered valid and the Court has jurisdiction to prohibit them. Conversely, the defendants assert that they are employees of the owners and trainers for whom

they perform horseshoeing services, that the latter stand in the position of employers, and that § 4 of the Norris-LaGuardia Act, 29 U.S.C.A. § 104, though couched in terms of jurisdiction, fully legitimates any price-fixing or boycotting on their part. Additionally, defendants assert that, even if they are not employees of the trainers for whom they work, the defendants are "person[s] participating or interested in a labor dispute" under § 13(b) of the Norris-LaGuardia Act, 29 U.S.C.A. § 113(b), and that the case involves or grows out of a labor dispute, since it "involves persons who are engaged in the same industry, trade, craft, or occupation," within the meaning of § 13(a) of the Norris-LaGuardia Act, 29 U.S.C.A. § 113(a). This latter argument is predicated on the fact that certain horseshoers, such as those employed by the larger stables and by the tracks, are clearly employees, and the defendants, collectively, assert that they have a direct interest in the condition of such horseshoers, as well as general conditions in the industry.

The starting point in the consideration of whether race track farriers are employees, and trainers and owners employers, is a recitation of the facts disclosed by the evidence. In order to consider the evidence of the present-day relationship, it is helpful to recite some history to show how the advent and growth of motor vehicles has altered the functions of horseshoers.

The defendant International Union was chartered in 1874. It became affiliated with the American Federation of Labor in 1893, and its maximum peak in membership was reached in the period 1915 to 1919, when it had 2,000 to 2,500 members. Its low point in membership was experienced immediately prior to 1940, when there were only three locals affiliated with the International Union. In 1953 total membership was one hundred ninety-five. At the present time twenty-two locals are affiliated with the defendant International Union, sixteen consisting of horseshoers of thoroughbred horses, four horseshoers of harness horses and two general horseshoers, who will shoe any type of horse. The present membership is more than double the membership in 1953.

Originally only those persons who were employees in a public horseshoeing shop were members of the International Union. As the use of the horse for transportation ceased, as illustrated by the shrinkage in the number of locals affiliated with the defendant International Union, the function of the horseshoer was limited to horses kept for pleasure. At this time, which was approximately in the late 1920s, thoroughbred and harness racing were carried on, but the length of meets were considerably shorter than at the present time; for example, racing during the winter seasons was relatively unknown. But, since the late 1920s, racing seasons have been extended and more race tracks have been established, so that during the early 1940s there was a vertible explosion of new locals, whose members provided shoeing services for race horses. In 1941, twelve or thirteen new locals came into being and affiliated with the International Union. At this time the usual pattern followed was that the horseshoers were empolyed on a full time salary basis by the large racing stables which maintained a number of horses and which participated in race meetings on a sectional, if not national, basis. Since that time fewer large stables have been maintained, and in their stead there has arisen the so-called public trainer who, for a fee, will train and race horses of owners who own too few horses to warrant the employment of a trainer whose services are devoted exclusively to their horses. As a result, there are at the present time only fifteen to twenty horseshoers employed by private stables on a full time salary basis — the remainder, insofar as thoroughbred racing is concerned, perform their services on a piecework basis for a public trainer for the account of the owners whose horses he is training and racing.

Services to public trainers are performed exclusively at the race track. At Maryland tracks, in addition to those horseshoers who are present on the track to render services to trainers, two horseshoers are employed by the track on a part time salary basis, to be present at the paddock and the receiving barn to render emergency services to a horse immediately before or after racing. The cost of providing

this service is borne exclusively by the management of the track.

Except for the few remaining horseshoers employed by owners or by track management, compensation to a horseshoer is based on piecework. An ordinary shoeing job requires thirty-five to forty minutes to perform. The fee exacted by the horseshoer for shoeing a horse includes the cost of adjusting the shoes during the period following the time that a horse is shod and before a horse requires reshoeing.

Originally, horseshoers manufactured the shoes which they applied to a horse, but in recent years premanufactured aluminum and steel shoes are the order, rather than the exception. The horseshoer purchases the shoes which he will require and includes the cost thereof in the fee which he charges without separately stating the cost of the shoes. In determining the fees to be charged, the members of Local No. 7 includes the bare cost of the shoes without any allowance for profit on resale, except if there is need for a special, more expensive, shoe. In that event, the overall charge will be in excess of the standard charge by the amount of the cost of the special shoe over the cost of the standard shoe. Some few owners or trainers furnish their own shoes. In that event, the farrier charges the standard fee, less the cost of regular shoes which he would otherwise provide.

Fees for shoeing horses are generally billed on a monthly basis, but is is not unusual for a horseshoer to be paid his fee immediately upon the completion of a given assignment. Some horseshoers also receive a retainer fee, that is, a fixed charge, in consideration of which they hold themselves available at all times to perform services for the owner or trainer who pays them such fee. When called upon to render services, they charge, in addition, the piecework fees set by the Local to which they belong when the sum of the piecework charges exceeds the amount of the retainer. Except for salaried horseshoers, an owner or trainer makes no deduction from the compensation paid a horseshoer for withholding taxes, workmen's compensation, or Federal

Contribution Act taxes. Members of Local No. 7 expect to charge, and be paid, at least the schedule of prices fixed by Local No. 7; there is no negotiation between the horseshoer and the owner or trainer.

Horseshoers perform their services in the stalls where the horse to be shod is customarily kept. At each Maryland race track there is a blacksmith shop which contains the facilities for heating and shaping the shoe, and which serves as a central meeting point for the blacksmiths at the track. Each blacksmith supplies his own tools, and when he has an apprentice he pays the apprentice a weekly sum according to the scale approved by the local union.

When a trainer desires the services of a horseshoer he makes the initial contact at the blacksmith shop. This contact is generally made only at the beginning of the racing meet. In most instances, the same blacksmiths will go from whom they customarily provide services move their horses, race track to race track, as the owners and trainers for whom they *customarily* provide services move their horses, so that it may be fairly said that the relationship, however denominated, between most trainers or owners and most farriers is a continuing one of indefinite duration and not sporadic and occasional.

There was evidence that the trainers do not control the time that a horseshoer works. One testified "He [the farrier] comes when he wants, goes when he wants, does what he wants." In the last analysis, a blacksmith controls his own working time like any other person who enters into a personal service contract, in that, except negatively under certain circumstances, he cannot be made to perform. On the other hand, there is economic pressure on him to work, since a horseshoer works to support himself and his family, and not simply for his own amusement. The record is clear, also, that in deciding when to work, as well as with regard to the quality of his work, a horseshoer is in the position of having to please the owner or trainer if he desires continued engagement, because the owner or trainer who is dissatisfied with the services of a particular farrier can, and does not hesitate, to replace him with someone else.

A farrier must also accommodate the needs of a particular trainer or owner with the needs of the other trainers or owners for whom he performs horseshoeing services, as well as to adjust his working time to the time that the horse is being trained, is being fed, and is being raced. Subject to these sometimes conflicting demands, I find that the trainer or owner does have control over the time that a horseshoer works.

To shoe a horse it is necessary that the old shoe be removed, the hoof filed to its proper level and degree of smoothness, the frog (the living part of the hoof) trimmed, a new shoe fitted (sometimes involving a trip to the blacksmith shop for heating and bending of the shoe), the new shoe nailed to the hoof and adjusted to a level, and the protruding portions of any nails filed to the level of the shoe or the shell of the horse's foot. In the actual performance of these services some of the owners and trainers testified, generally, that they neither exercised any control nor had any right to exercise any control over the farrier. A close analysis of their testimony, and a consideration of the testimony of the farriers, belies this conclusion.

The record is clear that the owner or trainer possesses the right to control and, on many occasions, exercises it. He regularly exercises the right to select the type of shoes which will be placed on a horse. Whether he exercises the right to control the later steps in the shoeing process is a matter of the degree of confidence which an owner or trainer has in the blacksmith who is performing services and perhaps, also, the temperament of the owner or trainer involved. Subject only to dissimilarities of temperament of various owners and trainers, when the owner or trainer has confidence in the farrier, and believes him to be skilled, he exercises little, if any, supervision over the performance of the various steps. On the other hand, if the owner or trainer lacks confidence in the ability of the farrier, he pays considerably more attention to the details of shoeing.

In support of these conclusions, the president of the International Union, who has been a horseshoer for thirty-four years, expressed the position of the farrier by saying,

"You try your best to satisfy the employer, many times against your own better judgment, but if it is his orders, you are working for him." He amplified this on cross examination by stating, generally, that the owner or trainer has the same degree of supervision over the farrier as the farrier does over his apprentice. An owner or trainer may, and sometimes does, decide how far the nails shall be driven into the hoof and the area where he wishes to place the nails. An owner or trainer may, and sometimes does, tell the farrier how much to trim from the hoof, even to the extent that he may cause the horse's hoof to bleed. Another farrier testified that the owner or trainer may specify the angle at which the hoof should be trimmed and may, and occasionally does, check the angle after trimming, before the shoe is applied. A third farrier — whose experience has been mostly at Maryland flat tracks — stated that during the shoeing process some trainers are present during the entire time and "tell you every move to make on shoeing the horse." He stated that some trainers go as far as to check the level of the hoof before the shoe is applied, to give specific instructions as to the length or shortness of the hoof and to instruct that the frog not be touched. One of the trainers, who, on direct examination, had disavowed any control over the horseshoer, admitted on cross examination that if there arose a difference of opinion as to how the horseshoer was performing his work, "I [the trainer] make him see it my way and have it done my way."

On these facts, defendants contend that the approach in *Board v. Hearst Publications*, 322 U.S. 111 (1944), should be followed, and plaintiffs should be held to be employees. In that case it was decided that newsboys who, by common law standards were independent contractors, should be treated as employees for the purposes of the National Labor Relations Act of 1935, because (p. 128) "the economic facts of the relation [with the publishers of newspapers]" made it "more nearly one of employment that of independent business enterprise with respect to the ends sought to be accomplished by the legislation." Plaintiffs counter by arguing that the holding in the *Hearst* case was legislatively reversed by enactment of the Taft-Hartley Act of 1947.

which amended definition § 2(3) of the National Labor Relations Act, 29 U.S.C.A. § 152(3), and they cite both the legislative history, as disclosed in H. R. Rep. No. 245, 80th Congress, First Session 18 (1947), and those cases which have construed the amendment to alter the holding of the *Hearst* case, *United Insurance Company of America v. N.L.R.B.*, 304 F. 2d 86 (7 Cir. 1962); *National Van Lines, Inc. v. N.L.R.B.*, 273 F. 2d 402 (7 Cir 1960); *National Labor Relations Board v. Steinberg*, 182 F. 2d 850, 854 (5 Cir. 1960); and *National Labor Relations Board v. Phoenix Mut. L. Ins. Co.*, 167 F. 2d 983 (7 Cir. 1948). Whether the holding of the *Hearst* case has continued life is problematical, in the light of these authorities, in spite of the contrary indications in *Mitchell v. Gibbons*, 172 F. 2d 970, 973 (8 Cir. 1949), and the citation of the *Hearst* case in *Meat Drivers v. United States supra*, in the concurring opinion (p. 107), and in the dissenting opinion (pp. 108-109). Plaintiffs argue that legislative adoption of the common law test in the Taft-Hartley Act directs the use of the same test here.

In support of the plaintiffs' contentions, it would seem logical that one who is an employee for purposes of the National Labor Relations Act should be an employee for the purposes of the Norris-LaGuardia Act, since there is an absence of any specific definition of an employee in the latter. But, resolution of this issue is unnecessary in the case at bar, since it appears that, even by the common law test, blacksmiths at race tracks are employees of the owners or trainers for whom they provide services.

One of the best statements of the common law test of who is an employee is contained in 1 Restatement Agency 2d (1958 Ed.), § 220, in the definition of the word "servant," a word the Restatement equates with "employee." There, a servant is defined by § 220(1), to be a person "* * * employed to perform services in the affairs of another and who with respect to the physical conduct of the performance of the services is subject to the other's control or right to control." A number of factors are set forth which should be considered in determining whether one is acting for another as a servant or an independent contractor. The

element of control is the first such factor mentioned, but others set out more fully in the margin are also to be considered.[4]

Not only is the fact of the right to control working time and each step of the horseshoeing process established here, there are other facts which indicate the relationship is one of employer-employee. A blacksmith is compensated on a piecework basis, but part of the consideration for his fee is the continuing services he is called upon to render, until it is time for the horse to be reshod. I have already found that temporally the relationship between owner or trainer and blacksmith is of indefinite duration and not occasional or sporadic. I conclude as a matter of law that for purposes of the Norris-LaGuardia Act the farrier is the employee of the owner or trainer for whom he performs horseshoeing services.

The authorities relied on by the plaintiffs for a contrary conclusion are not persuasive. It is recognized that rarely are any two cases alike on their facts, yet the conclusion that the "union fishermen" in *Columbia River v. Hinton,*

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[4] Restatement, Agency 2d (1958 Ed.) § 220(2):

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered.

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a district occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business."

supra, and the grease peddlers in *Meat Drivers v. United States, supra*, were "little businessmen," i.e., independent contractors, was largely based on the fact that they were sellers of commodities and received their compensation from profit. Farriers here do not sell commodities; they sell only services. True, included in the standard price for horseshoeing is the cost of a standard shoe, not separately stated, but the manner in which the cost of special shoes is handled clearly demonstrates to my mind the correctness of the statement that, with respect to a standard shoe, the farrier charges no more than the actual cost to him, so that he receives fixed piecework compensation for a standard service.

Nor do I find, *United States v. Real Estate Boards, supra*, which held real estate brokers and agents to be independent contractors, or *Ring v. Spina*, 148 F. 2d 647 (2 Cir. 1945), which held a playwright not an employee of a theatrical producer, to indicate a contrary result, because an analysis of the services rendered by the alleged employee in each of these situations, and the nature of the service, demonstrate an absence of the actual control, or right to control, so clearly present in the case at bar. The only clear-cut decision contrary to the conclusion which I have reached is the decision of the Ontario Labour Relations Board, in *International Union of Journeymen Horseshoers, Local No. 20, and Merrill, et al.* (May 27, 1963), which held that certain horseshoers, including one who testified at the instant case, who are members of Local No. 20, were not employees of Canadian trainers and owners for whom they perform services. This decision is one by a Canadian administrative agency applying Canadian law and, upon my consideration of American law and American cases, I have concluded that I should not follow it.

From what has been said, it is unnecessary to consider defendants' second contention.

As ultimate conclusions, I find that I lack jurisdiction to grant injunctive relief, and that plaintiffs are not entitled to the other relief they seek.

Counsel may agree upon a form of order and submit it within ten days.

APPENDIX B

SHERMAN ANTITRUST ACT

Public Law No. 190, 51st Congress of the United States, First Session Approved July 2, 1890

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * * *

CLAYTON ANTITRUST ACT

Public Law No. 212, 63rd Congress of the United States, Second Session Approved October 15, 1914

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be

held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

* * *

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application for which injury there is no adequate remedy at law, and such property or property right must be described with particularly in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

ANTI-INJUNCTION ACT (NORRIS-LAGUARDIA ACT)

Act of March 23, 1932 (H.R. 5315) Public Law No. 65, 72nd Congress (47 Stat. 70, U.S. Code, Title 29, Sections 101-115)

Sec. 1. (Jurisdiction of Federal Courts to Issue Injunctions in Labor Disputes: Limitation) No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

* * * * * *

Sec. 4. (Specific Acts Not Subject to Injunction.) No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any cases involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

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Sec. 13. (Definitions.) When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the

same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

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